United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-1290

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P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED RUBBER, CORK, LINOLEUM AND PLASTIC WORKERS OF AMERICA, AFL-CIO, an unincorporated association, and UNITED RUBBER, CORK, LINOLEUM AND PLASTIC WORKERS OF AMERICA, AFL-CIO, LOCAL 102, an unincorporated association,

Plaintiffs-Appellants,

vs.

LEE NATIONAL CORPORATION,

Defendant-Appellee.

BRIEF OF PLAINTIFFS-APPELLANTS

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NOTE

The following abbreviations are used herein:

"(R)"	Record on Appeal - not reproduced in Appendix
"(EX)"	Exhibit in Evidence - not reproduced in Appendix
"(EX [A])"	Exhibit in Evidence [denoting location in Appendix]
"(A)"	Transcript of Proceedings - reproduced in Appendix
"(CONWAY A)"	Example of testimony of a witness or the Court denoting location in Appendix
"(Opinion [A])"	Specified Opinion or Order of Lower Court [denoting location in Appendix]
"R [A])"	Record on Appeal [denoting part reproduced in Appendix]
"(D.Br.)"	Reference to Defendant's Answering Brief
"(P.Br.)"	Reference to Plaintiff's Main Brief

UNITED STATES COURT OF APPEALS
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UNITED RUBBER, CORK, LINOLEUM AND PLASTIC WORKERS OF AMERICA AFL-CIO, an unincorporated association, and UNITED RUBBER, CORK LINOLEUM AND PLASTIC WORKERS OF AMERICA, AFL-CIO, LOCAL 102 an unincorporated association,

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LEE NATIONAL CORPORATION,

Defendant-Appellee.

BRIEF OF PLAINTIFFS-APPELLANTS

I. STATEMENT OF THE CASE

This was an action in the United States District Court for the Southern District of New York. As tried below, it consisted of two plaintiffs and two causes of action. The First Cause of Action was by Local 102 of the United Rubber, Cork, Linoleum and Plastic Workers of America, AFL-CIO (hereinafter "Local 102") against Lee Rubber & Tire Corp. (hereinafter "Lee" or "the Company"). The Second Cause of Action was by the United Rubber, Cork, Linoleum and Plastic Workers of America, AFL-CIO

(hereinafter "URW") the parent international union on behalf of and as successor to its Local 224 (hereinafter "Local 224").

The First Cause of Action was for damages resulting from Defendant's failure to arbitrate 23 grievances outstanding at the time of the sale of its Republic Rubber Division, on December 20, 1963. The Second Cause of Action was for damages for breach of contract resulting from the failure of the Defendant to pay a Special Distribution upon Discontinuance of Operations of its Lee Tire Division.* (A33-53)

The action was tried before Whitman Knapp, J sitting without a jury. On November 2, 1973, the Court entered its final opinion and decision granting judgment for Defendant, dismissing the entire complaint at the end of Plaintiffs' case (A1496) as further amplified by the final argument heard on September 21, 1973. (A1385-1441)

This is an appeal from the final judgment entered on November 7, 1973, on said opinion and order (A1503). For practical purposes and because of the relative insignificance of the damages, Plaintiffs are dropping their appeal as to the

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* a third Cause of Action on behalf of certain retired former members of Local 227 for damages resulting from the Defendant's alleged failure to pay certain hospital and insurance benefits was dismissed by Hon. Walter Mansfield in an opinion filed February 22, 1971 (A1442-1460) granting Defendant partial summary judgment as to this part, but denying same with respect to the above noted first two causes of action.

First Cause of Action and proceeding only with the dismissal of the Second Cause of Action as stated above.

II. STATEMENT OF ISSUES

The issue on this appeal is whether the Court below was correct in granting Defendant's motion to dismiss the Plaintiffs' Second Cause of Action at the end of Plaintiffs' case.

III. STATEMENT OF FACTS

1. The Parties.

A. The Company

Lee Rubber & Tire Corporation was, during the period in question, a medium-sized company manufacturing tires and specialty rubber products. The Company was split into two divisions, the first being the Lee Tire Division, located at Conshohocken, Pa., which was primarily involved in the manufacture, sale and distribution of automobile and truck tires, and the second being the Republic Rubber Division, located at Youngstown, Ohio, which was engaged in the manufacture, sale and distribution of varied industrial rubber products (A1461, A1468).

B. The Union

Both the Lee Tire Division and the Republic Rubber Division of the Defendant Company were organized for collective

bargaining purposes by the United Rubber, Cork, Linoleum and Plastic Workers of America, AFL-CIO (URW) which, through two of its locals, represented all of the production and maintenance workers at each plant (EX.1, EX.35[A1549]). The URW, furthermore, at all times in question, represented production and maintenance workers at all similar competing companies and facilities throughout the country (EX.123A[A1908] ; EX124A[1915]).

Local 227 was the bargaining agent for the Conshohocken plant of the Lee Tire Division and Local 102 was the bargaining agent for the Youngstown plant of the Republic Rubber Division. Each local had been recognized and dealt with the Company in each of its divisions for many years previous to the time in question. (A1461,A1468).

2. The Contracts.

At both plant locations there existed two key labor agreements, the Working Agreement (EX.1; EX2[A1513]; EX35[A1549]) and the Welfare Agreement (EX.1A; EX36[A1581] ; EX.37[A1607]) each separately entered into by the Company with Local 102 and Local 227. The Working Agreement (otherwise known as the Collective Bargaining Agreement) governed rates of pay, hours, as well as the terms and conditions of employment. Such agreements for both plants covered the period from July 1, 1961 to June 30, 1963.

The Welfare Agreement covered the application of various fringe benefits, such as Pensions, Supplemental Workmen's Compensation, Insurance, and Service Awards and Special Distribution Upon Discontinuance of Operations (A1469-1472). The Welfare Agreements covered the period from June 30, 1961, to June 30, 1966, thus creating an overlapping period between the pertinent labor agreements at each location (A1472).

The Welfare Agreements provided that they could be reopened by either party for renegotiation after May 1, 1964, and that upon such reopening, failure of the parties to agree on new terms within 60 days thereafter, would allow either party to terminate the Welfare Agreement upon a further 60 day notice. This was referred to as the early termination clause. Furthermore, either party, upon exercising its right of termination under the Welfare Agreement, could also simultaneously terminate the Working Agreement (A1472).

At both plant locations, there was also a Supplemental Unemployment Benefits Agreement which ran concurrently with the Working Agreement (EX.96A).

There was nothing in either of the Union contracts which would have prevented the Company from closing down its

operations and selling its facilities, trade name and good will (A82). However, critical to the issues in the Second Cause of Action is the fact that if the Company announced a discontinuance of further operations, it would have been undisputedly liable under the Welfare Agreement for substantial sums in severance pay and other benefits (EX.36[A1581]). Article II, Section 6 thereof, provided:

> "In the event that all operations of the employer at the plant covered by this agreement...shall be completely and permanently discontinued, a Special Distribution shall be payable to each employee."

The amount of total benefits was in dispute, but the Company conceded that its liability would be approximately $2,000,000 if Plaintiff succeeded in their Second Cause of Action, (A86) CLAIRMONT A840) whereas Plaintiff claimed it might run as high as $5,000,000 for the Conshohocken plant employees (A80-80-1).

3. The New Management Group.

For approximately one year prior to the summer of 1962, working control of the Company had been slowly acquired by Maurice M. Clairmont ("Clairmont") (EX.30A[A1660]; EX.54A [A1694]; CLAIRMONT A614-618) in concert with a close-knit group of partner-investors including Mornay Corp., a domestic corporation; Darfina, A.G., a Swiss corporation; and Matignon N.V., a Dutch corporation (CLAIRMONT A949-951). Of the group,

Clairmont was the acknowledged leader and single largest investor (CLAIRMONT A905; EX.32A[A1664]; EX.60A(1)-60A(9)[A1731-1744]).

Clairmont's prior activities had engendered a good deal of public comment and he came upon the scene with a reputation among the employees as a corporate liquidator (CLAIRMONT A848-853; CONWAY A1142; EX.30A-EX.32A[A1660-1665]).

By May - June 1962, Clairmont had acquired sufficient control so as to have become the dominant stockholder in the Company (CLAIRMONT A616-622) and a member of the Board of Directors (CLAIRMONT A904-905). In September 1962, he became Chairman of the Board and Chief Executive Officer of the Company (CLAIRMONT A904). The Court below specifically found that Clairmont's decisions were the decisions of the Company (A1116).

4. The Company's Condition in 1962.

The Lee Tire Division had been profitable for many years (EX.139A[A1974]). However, in the Summer of 1962, this Division, which had been in a state of declining profitability for the previous three years (EX.139A[A1974]; EX.30A[A1660]; EX. 54A[A1694]), was due to turn into a substantial loser due to the imminent loss of its major customer, Phillips Petroleum Co., which had accounted for about 40% of the Divisions' total sales

volume (CLAIRMONT A731) and the disintegration of the Company's wholly owned sales branches which accounted for almost all of the remaining sales volume (EX.90A, p.3-4[A1802 at 1804-1805]; EX.55A[A1702]; CLAIRMONT A731).

Shortly before Clairmont took over, the Company was in the process of being left with a large cash position (CLAIRMONT A625; EX.54A[A1694]; EX.55A[A1702]; EX.56A[A1713]), a substantial tire manufacturing facility at Conshohocken with a nationally recognized trade name in the tire business and, at Youngstown, the Republic Rubber Division, manufacturing sundry rubber products at a modest profit (EX.62A[A1746]). Ultimately, the plant and trade name at Conshohocken was sold for approximately $4,500,000.00, and the Republic Rubber Division was sold for approximately $5,500,000.00 (EX.62A[A1746]; EX.68A[A1782].

Clairmont, an acknowledged master of corporate finance and a successful manufacturer (CLAIRMONT A624; EX.30A[A1660]), issued a comprehensive report to stockholders in the 1962 annual report in his role as Chairman in which he reviewed the condition of the Company (EX.54A[A1694]). Such review had been conducted over a period of time while he was obtaining control over the Company (CLAIRMONT A621-624, 726-731), investigating various aspects of the labor agreements (CLAIRMONT A905),

touring the plant and all related facilities several times (CLAIRMONT A622-624), and discussing the workings of the Company with various concerned people (CLAIRMONT A780-781). He essentially described the problems of the Company as follows:

> "1. Unprofitable operations in a large number of the Company's branches.
> 2. The existence of certain unprofitable sales arrangements or commitments.
> 3. The cost of funding pensions under the union agreements...
> 4. The increased costs of doing business to which our Company is particularly sensitive, in view of the higher than usual overhead relating to our system of distribution in the tire division. The impact of such higher expenses was even more severely felt this year due to the Company's smaller sales volume in that division.
> 5. Write-down of certain obsolete and slow moving inventories of non-tire automotive supplies which had to be written down to expected actual realizable values in view of our withdrawal from and projected disposal of most of the non-tire automotive items distributed by the Company.
> 6. A substantially higher charge-off this year for uncollectible receivables ...
> 7. In connection with plans to eliminate certain undesirable and unprofitable products and activities, provisions were made for the implementation of this program..." (EX.54A[A1694]).

5. Clairmont's Efforts to Amend the Welfare Agreement.

Shortly after Clairmont took over the Company, he made several major attempts to eliminate certain liabilities or at least minimize the effect of a shut-down of operations (CONWAY A1163-1166). The Welfare Agreement, which included provisions

for Service Award and Severance Pay (the Special Distribution on Termination of Operations) had been amended in June 1961 (EX.36 [A1581]). In May 1962, seizing upon a technicality in the agreements covering both Divisions concerning the necessary approvals by the Company's Board of Directors and/or shareholders concerning the funding provisions of the Pension Plan (CLAIRMONT A669-670, A911-914; EX.6A[A1632]; EX.29A[A1656]; EX.36[A1581]) [the first part of the Welfare Agreement], which was the subject of the 1961 amendment, Clairmont engaged the Union in a series of discussions and proposals set forth by the Company, looking to a further amendment of that agreement (CLAIRMONT A905-909; CONWAY A1196-1198; EX.87A[A1794]; EX.88A[A1795]; EX.89A[A1799]; EX.118A-118A[2][A1904-1907]).

In various written proposed amendments, Clairmont attempted to obtain, as he himself testified (CLAIRMONT A670), a co-termination date for the Welfare Agreement to coincide with the Working Agreement. Specifically, Clairmont wanted the Welfare Agreement to terminate on June 30, 1963 with the Working Agreement (CLAIRMONT A963-964). This would have meant that he could avoid the obligations of the Severance provisions of the Welfare Agreement if the Company refused to reach a new Working Agreement (CLAIRMONT A670; CONWAY A1167; EX.87A[A1794]; EX.29A[A1656]).

In another proposal, Clairmont took the unusual step of requesting that payments of Pension Benefits and the Special Distribution on Discontinuance of Operations (Severance Pay) be forfeited if the shut-down of Company operations were the result of a strike (CLAIRMONT A670). The pertinent clause was to read:

> "In the event that all operations of the Employer at the plant covered by this Agreement of which this Exhibit is a part shall be completely and permanently discontinued, but not as a result of a strike started for any reason other than the violation by the Company of the provisions of its Working Agreement with the Union, a Special Distribution shall be payable to each employee..." (EX.87A[A1794]; EX.88A[A1795].

He also sought to eliminate personal liability of officers and directors for failure of the Corporation to pay such benefits, and sought to limit all such payments to a specific fund (EX.87A[A1794]. Such a fund was already set up for the Pension Program, the obligations of the Company accruing under the Pension Plan being limited to the assets of the Fund, whereas there was no fund yet created for the Severance Pay obligations. Furthermore, the Pension Fund was in itself in dispute since the Company had not yet commenced funding (CLAIRMONT A906; EX.6A[A1632]; EX.90A, P. 7 [A1802 at 1808]). The Company and the Union ultimately agreed upon a further amendment to the Welfare Agreement dated December 17, 1962

(EX.37[A1607] which clarified certain language at the request of the Company but did not change the substance (CLAIRMONT A670; EX.37[A1607]).

The next attack was on the amount of current funding to be required of the Company. Clairmont claimed that the obligations under the Funding Agreement would require the Company to put up approximately $500,000.00 per year (CLAIRMONT A907; EX.30A[A1660]; EX.54-A[A1694]. He claimed the Company could ill afford to do this considering its current earnings picture (EX.30A[A1660]; EX.90A, p.4,7[A1802 at 1805, 1808]).* Therefore, he suggested that the Union allow minimal funding over a longer period of time instead of the prior method (EX.30A[A1660]; EX.32A [A1664]; EX.90A, p.5-9 [A1802 at 1805-1810]; EX.56A, p.9[A1713 at 1721]). This procedure would reduce the current amount payable by the Company into the Fund for a long period of time. This subject he pursued vigorously in various meetings commencing in the Fall of 1962 and extending into the Spring of 1963 (EX.30A-32A[A1660-1664]; EX.90A, p.7[A1802 at 1808]).

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*cf Garthwaite's statement to the contrary in his message to stockholders dated Jan. 19, 1962:

> "...It is estimated by the Company's actuaries that the minimum funding required will amount to...a total of $470,820...As this revision is in accordance with industry practice, placing the Company at no competitive disadvantage,..." (EX.107A, p.5-6[A1897 at 1901-1902]).

Next, in a meeting with the Union officials on April 16, 1963, Clairmont asked that the Union agree to either eliminate altogether half of the Company's obligations for past service liability or suspend such obligations for an alleged short period of time (CLAIRMONT A668; EX.90A, p.4 [A1802 at 1805]). His request to reduce funding the total Company obligations for past service liability, which came to approximately $7,000,000.00 (EX.54A, p.9 [A1694 at 1701]; EX.55A, p. 9 [A1702 at 1710]), and for which the Company had not yet even begun to fund (CLAIRMONT A906), was to eliminate a financial obstacle in the way of a possible merger or sale of the Company (CLAIRMONT A666-669; EX. 90A, p.7 [A1802 at 1808]). The Union rejected this request since to do so would take away vested rights and benefits from retirees and others soon to be retired - merely on the possibility that such a deal might be put together in the future (EX.90A, p.4-6 [A1802 at 1805-1806]).

6. Bargaining For a Shut-Down

It was Plaintiffs' contention at the trial that Clairmont, having failed to get the Union to agree to a watering down of the Welfare Agreement which would minimize or eliminate the obligations of the Company to pay contractual benefits in

the event of a close-down, he then set on a course of closing down the plant under the guise of being struck by the Union long enough to reach the date when the Company could terminate the Welfare Agreement and then cease operations (Transcript 1785-1970[A1073-1124]; A1385-1441; EX.36[A1581]).

On April 19, 1963, almost immediately after the April 16th meeting between Clairmont and the Union officials, noted above, at which the Union declined to go along with Clairmont's final suggestion to cut in half the Company obligations for funding past service liability, the Company resorted to the unusual procedure of an employer sending the requisite notice to terminate the Working Agreement and to request negotiations leading to the formulation of a new agreement as of June 30, 1963 (A1461 at 1472-1473; EX.38[A1610]).

It is almost universal practice for the Union and not the employer to send such a notice prior to the regular termination date in order to bargain for increases in wages and fringe benefits (CONWAY A1189-1190).

Negotiations leading to the formulation of a new Working Agreement commenced on May 29, 1963, and continued intermittently thereafter (A1461 at 1473-1476). The Company pro-

duced a ponderous document containing 10 major and about 90 lesser proposals for changes in the Working Agreement where normally it is the Union which seeks the changes (CONWAY A1195-1196; EX.98A [A1845]). An essential fact forming the background to this document was the then current status of the work force at the Conshohocken plant--production had been drastically curtailed and the layoff program had accelerated from early 1963 when the work force was about 1100 until it got down to 261 in June, 1963 (EX.54; EX.55; EX.105A; EX.106A; HESS A99-100). And some of the remaining workers were assigned to non-production jobs such as mowing grass and painting, work not previously performed by the production employees (CLAIRMONT A792).

It was undisputed that it had been regular industry practice for the tire companies to follow the wage package negotiated by the Big Four--Goodyear, Goodrich, General Tire and Firestone (which in 1963 had been an increase of $.09 per hour) and then for each company to negotiate fringes and working conditions on their own (CONWAY A1143, 1196).

Among the Company's proposals for changes in the Working Agreement (EX.98A[A1845]) were:

1. an <u>across-the-board wage cut of 25%.</u>

2. a complete job evaluation program to be set up entirely within the Company's sole discretion as to standards to be set for jobs and as to rates to be set for incentive workers.

3. a proposal to limit recall rights for all laid off employees to six months, after which such employees could be permanently terminated by the Company in its sole discretion if, in the opinion of the Company, its future plans would not require the services of such workers. The effect of this would have been to totally eliminate all but the 261 employees from any benefits under the Welfare Agreement as soon as their layoff status passed six months. If agreed to by the Union, the Company could have laid off even more employees, cut off all rights after six months, and then closed down, owing Pension Benefits and Severance Pay solely to those few workers remaining at the end, and could have done all this without breaching the terms of the Welfare Agreement.

4. The Company requested a roll-back of all the cost items granted in the 1961 negotiations together with eliminating the $5.00 per hour increase in the maximum supplemental unemployment benefits and elimination of separation pay under the S.U.B. Agreement.

5. Creating key job classifications permanently and for the first time, which precluded bumping and required recall to such key jobs regardless of plant-wide seniority status.

The negotiations for a new Working Agreement continued throughout June and to the middle of July, 1963. Between May 29, 1963 and the contract termination date of June 30, 1963, the Company made only minimal changes in its demands (CONWAY A1197-1198) e.g. reducing its demand for a wage cut from 25% to 20% (EX.13A[A1643]). The Union, for its part, countered with major concessions, perhaps the most important of which was to forego the wage increase of the industry pattern as set by the Big Four negotiations of that year which obtained increases of $.09 for 1963 and $.07 for 1964 (EX.101A, p.2[A1889 at 1890]). The Union even offered to extend the terms of the old contract for another year and to provide co-termination of agreements commencing in 1964 (EX.134A[A1956]), while also indicating approval of a productivity sharing program (EX.101A[A1889]; EX.102A[A1892]).

The Company did not provoke a strike by these harsh demands. The next step by the Company (Clairmont) came on July 16th with what the District Court found was a lockout: the promulgation of the so called "Work Rules" (EX.44[A1623]; Court A1079, A1094).

7. Promulgation of the Work Rules and Shut-Down.

While the Union had taken a routine strike vote prior to June 30, 1963 (A1461 at 1474) it never threatened to strike or talked about such possibility, either before or after the June 30th deadline. The minutes of the negotiating sessions make no reference whatever, to any threat by the Union to walk out (EX.127A-138A[A1918-1971]; EX.99A-102A[A1881-1892]). In fact, Garber stated on June 19th that the Union would not be railroaded into a strike (EX.134A, p.3[A1956 at 1958]).

The parties were still negotiating on July 16, 1963, when suddenly, Conway, the Company's Personnel Director, and ostensible Chief Negotiator, was, without prior notice or discussion, handed a set of "Work Rules" by Clairmont, together with a letter of transmittal and told to deliver these forthwih to the Union (EX.43[A1621]; EX.44[A1623]; CONWAY A1144, A1212-1214).

The record disclosed that Conway attempted to get the Company to at least hold back the effective date of the Work Rules so as to permit negotiations to continue, but the request was rejected (CONWAY A1205-1206, 1212-1218, 1220).

In either event, the Court below determined that the effect of these Work Rules was a lockout (Court A1079, 1094, 1098, 1414).

After the lockout started, the Company continued to go through the motions of sporadic negotiations by continuing to meet with the Union and the Federal Mediator, but merely to restate its own position (EX.37A-43A[A1668-1688]). The Company never backed off any aspect of its "Work Rules", nor does the record show that the Company made any offer whatsoever of compromise or came forward with a suggestion as to how to break the impasse between the Company and the Union (EX.37A-43A[A1668-1688]; CONWAY A1220-1222). Conway even testified that despite his function as Chief Company Negotiator and Personnel Director, he was never asked for any ideas or suggestions on how to ameliorate the situation (CONWAY 1212-1214, 1218).

Instead, while the lockout was in progress, the Company further reduced the supervisory work force, until it reached skeleton force level (CONWAY A1225-1226) and contracted out tire production to URW-organized plants of competitors for the purpose of supplying minimal contract needs (A1461 at 1479-1840; CLAIRMONT A734-735,921; EX.15A, EX.16A).* The Company

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* to keep the Lee trade name alive.

also terminated the salaried employees Pension Plan (EX.55A, p.9 [A1702 at 1710), allowed most of its top key executives to leave the firm (CONWAY A1226-1227), including several hired personally by Clairmont, and sold off its Republic Rubber Division to Aeroquip Corp. (EX.62A[A1746]; EX.3-6[A1541-1545]; EX.55A[A1702]), for which it sought approval by stockholders in a proxy statement, dated November 25, 1963 (EX.61A[A1745]; EX.62A[A1746]).

During the period just prior to the July 16th lockout, and beginning on June 13, 1963 and continuing thereafter through December 1963, Clairmont and his partners continually purchased common stock of the Company, managing to accumulate a very substantial number of shares (EX.60A(1)-(9)[A1731-1742]). The record may have been incomplete as to pertinent S.E.C. statements concerning such insider stock purchases, so that the amount shown may be only a minimum. The true amount is not known since Clairmont testified that he had long since forgotten how many shares he purchased or at what prices he purchased or later sold (CLAIRMONT A845). * * All these purchases were made at a time

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** But proxy statements over the ensuing years show a massive position acquired by Clairmont and his two key partners - Matignon and Darfina (of which H.L. Schick, Corp. Secretary of Lee National, was the prime shareholder) as well as a substantial interest acquired by Heinrich (EX.64A[A1767]; EX.66A[A1773]; EX.69A[A1783]; EX.70A[A1789]).

when Clairmont was announcing that a strike was imminent (EX.86A [A1792]), that the economic outlook of the Company was dismal (EX.54A[A1694]; EX.108A[A1903]), and again just prior to his announced sale of the Republic Rubber Division, which met with obvious market approval (EX.62A, p.8[A1746 at 1753]; CLAIRMONT A945-949).

Conway finally retired and withdrew from the Company in February 1964 (CONWAY A1145), and shortly thereafter the Company sent a letter to all laid off employees, dated March 10, 1964 (EX.19A[A1653]) informing them of their permanent termination as employees of the Company. This letter was sent, as Clairmont later testified, pursuant to the Work Rules rather than in accordance with the terms of the then existing Welfare Agreement (CLAIRMONT A792).

On May 1, 1964, the first day on which either party could give notice of intention to reopen the Welfare Agreement, the Company sent the requisite notice to the Union (A1461 at 1480; EX.45[A1626]).

On July 8, 1964, after some pro forma negotiations, the Company sent a notice of termination to the Union as required by the terms of the Welfare Agreement, stating that due to failure

to agree on terms for a new Welfare Agreement, the same could be and was deemed to be cancelled on 60 days notice (EX.48[A1628]). This was accomplished two months later by the Company notice to the Union of final termination of the Welfare Agreement, as of September 8, 1964 (A1461 at 1481).

Thereafter, while the continuity of picketing outside the plant gave the appearances of a work stoppage still in progress(id.at 1482-1483), the Company's Board of Directors voted on November 30, 1964, to formally discontinue all operations at Conshohocken (id. at 1482) which decision was made effective as of December 10, 1964. Pursuant to this notice the Company sent a letter of explanation and a termination notice to all present and former employees, dated December 14, 1964 (EX.50[A1629]; EX. 51[A1631]). The plant was soon afterwards sold to a subsidiary of Goodyear, for about $4,500,000.00, together with the name of Lee Tires (the subsidiary thereby created being known as Lee Tire and Rubber Corp.(CLAIRMONT A685-696; EX.57A[A1723]; EX.65A [A1772]; EX.68A[A1782]).

The Union members all notified the Company of their individual election for the Special Distribution on Termination of Operations under the Welfare Agreement, Article II,

Section 6, and, as specified thereunder, collectively filed a grievance with the Company for its refusal to recognize same (EX.52).

Coincidentally, the members of Local 227 continued picketing the Conshohocken plant even after the Company's formal announcement of closing until the plant was sold to and occupied by Goodyear in 1965. In the process, Local 227 was disbanded by the International Union which succeeded to all of its assets and liabilities. A new local was eventually set up to represent the production workers at the new Goodyear plant after the URW organized it that year (A33).

8. The Trial.

Original counsel for the Plaintiffs filed the Note of Issue in the Court below, without having undertaken any Discovery and Inspection. Efforts by trial counsel to correct that situation before trial were unsuccessful (R27-34).

Before trial, the Defendant moved for summary judgment, which resulted in a decision by Hon. Walter Mansfield, dated February 22, 1971 (A1442-1460), in which the Court granted Defendant's motion to the extent of striking an incidental third

cause of action (see footnote, supra atp.2), and eliminating the alternative remedy of compulsory arbitration from Plaintiffs' second cause of action. Crucial elements of this opinion, although obiter dicta, had such a persuasive effect on the Trial Court below that they are herewith set forth:

> "...The essential theory of the Union's case is that the Company perpetrated a fraud upon its Local by unilaterally imposing conditions which provoked and forced a strike, thus making it appear that the Company was shut down by unreasonable Union members striking over simple economic issues. Then, during the course of this forced strike, the Company's plan was to terminate the Welfare Agreement two years before its ordinary termination date, pursurant to procedures providing for such early termination. The Company is liable, says the Union, because it in reality shut down the plant on the day it forced the Union to strike, or at least sometime before September 8, 1964, the date when the Welfare Agreement was terminated.
>
> "Thus the Union must prove that the discontinuance of plant operations by the Company actually occurred at or about the time when the strike commenced, which was on July 16, 1963, rather than on November 30, 1964, when the Company's Board voted to discontinue operations. Upon the record before us the Union appears to have almost no chance at all of sustaining this heavy burden. Quite aside from testimony of Company officials as to their intentions, there is overwhelming evidence that the Company, after the strike began and even after the Welfare Agreement was terminated, <u>was</u>

struggling to resume operations.* For instance, it continued after September 8, 1964 to maintain at the Conshohocken plant a large staff (some 55 persons) of executive, administrative, sales and technical personel. * Salesmen continued to promote and sell Lee tires, to conduct sales training programs, and to service Lee tire sales branches. There was no attempt to dispose of the plant or any of its tire-making equipment. On the contrary, maintenance personnel continued to keep the plant and machinery in condtion for resumption of tire manufacture as soon as the strike should end. ** Laboratory personnel continued to redesign molds for development of new production. * During the entire period existing customers were supplied by arrangements with Mohawk Rubber Company and United States Rubber Company to manufacture Lee tires from Lee molds.**

"The Union's claim furthermore appears to us to be but a belated rationalization, which is inconsistent with its own earlier position. In January 1965, for instance, the Union contended that the discontinuance of operations had occurred on December 14, 1964. Its original complaint, filed on April 25, 1966, alleged that the Company had ceased operations on or about July 1, 1965. A complaint filed by it in the Pennsylvania Court of Common Pleas alleged that it discontinued in January 1965. It was not until September 1967, after the weakness of its position became apparent, that the Union took its present stance to the effect that the July 1963 strike constituted a "lock-out" and a complete and permanent discontinuance of all operations at the plant within the meaning of Article II, Section VII, Special Distributions on Discontinuance of Operations."

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*Emphasis supplied. The Trial Court specifically found no evidence of these facts (COURT A1114A-3 to 1115).

**This made the sale of the plant plus the Lee name for $4,500,000.00 possible (EX.57A[A1723]).

> "Notwithstanding the apparent flimsiness of plaintiff's claim, we are precluded, under the interpretation of Rule 56 which governs in this Circuit, from dismissing the second cause of action as a matter of law. Despite the weakness of the claim, it does present an issue as to the intent of the Company, i.e., whether the management purposely provoked or forced the Union into striking on July 16, 1963, with the intent of permanently closing down operations and never thereafter reopening. If the record before us at trial were the same as that before us on this motion, judgment would be entered in favor of the Company.*** At this stage, however, since a material issue has been presented as to the management's intent, we cannot act summarily and we must permit the case to go to trial..." (A1442 at 1452-1454).

The Trial Court centered much of its attention from the very outset on Judge Mansfield's decision and particularly the obiter (Court A80,81[1], 84, 85[1]). For example, in entertaining final argument on February 26, 1973 (R58) prior to its later decision to reopen, the Court referred to Judge Mansfield's opinion by saying:

> Let's start with Judge Mansfield's opinion on page 1187 where he said, 'If the record before us at trial were the same as that before us on this motion, judgment would be entered in favor of the Company.' What have you proved that wasn't before Judge Mansfield?" (Court A1073).

***Because there were no discovery proceedings and for other reasons, the record at trial was substantially different. (A1074 et seq.)

Plaintiffs pointed out the many differences between the record produced at trial and that which was before Judge Mansfield including, inter alia, discussion of the tread tuber (HESS A977-1006 passim; HEINRICH A1006-1016 passim), a substantial addition to the set of minutes of negotiation meetings (EX.99A-102A[A1881-1892]' EX.127A-138A[A1918-1971]), the minutes of the April 16, 1963 meeting (EX.90A[A1802-1813]), and the testimony of Garber, the Chief Union Negotiator and International Unions' trouble-shooter (GARBER A332-588), Maurice Clairmont, former Chairman of the Company and obviously the key witness in the trial (CLAIRMONT A610-976), together with pertinent additional testimony from Willard Heinrich, former Company Treasurer and close associate of Clairmont (HEINRICH A1006-1033) and Michael Sabol, International Representative for Local 227 (SABOL A1034-1072).

The trial proceeded from January 23, 1973 until February 26, 1973, at which time the Court granted from the bench Defendant's motion to dismiss the complaint as to the second cause of action after opposition by Plaintiffs (R58 [A1073-1124]). In the argument on the motion on February 26, 1973, the Court referred repeatedly to Judge Mansfield's opinion, first to inquire, as stated above, concerning the differences in the record presented, and then as to how

Plaintiffs thought they had sustained their heavy burden in proving the "essential theory of the Union's case" as stated by Judge Mansfield (supra at p.24).

Clairmont testified that the previous management was totally "non-existent" (CLAIRMONT A621). When asked if, in view of the non-existent management, the plant needed new equipment and/or revision of the layout of equipment, he stated:

> "I had been told by everybody that we have all throughout all the departments the equipment we need to produce competitively, and that was to my satisfaction." (CLAIRMONT A838).

Thereafter, Hess, the President of the Local, testified that they had been having a great deal of trouble with the old single tread tuber. There was a new twin tread tuber (previously ordered) sitting in the warehouse which would have caused a tremendous increase in efficiency of manpower in the production of tire treads and in eliminating waste. If it had been installed it would also have given management the right to re-evaluate a substantial number of jobs without waiting for a new contract (HESS A990-1005; SABOL A1059-1063). He also testified that the tread tuber was the length of a football field (HESS A995).

Heinrich testified that everything Hess said about what the old tread tuber did and what benefits it could provide was true (HEINRICH A1007, 1016). Heinrich, however, testified that only the basic parts of the tread tuber were in the warehouse and Clairmont had authorized the spending of some $200,000 for installation of all the tread tuber equipment, which was due to be completed and operable in July 1963 (HEINRICH A1008-1016).

After having made a statement to the effect that if Judge Mansfield had known about the tread tuber he would have granted the Defendant's motion for summary judgment, Judge Knapp made it clear he was granting the motion to dismiss the second cause of action (Court A1086).

Entry of an order dismissing the second cause of action was withheld pending filing by Counsel of briefs as to the first cause of action on behalf of Local 102 (Court A1122-2 to 1124). Thereupon the Court entered a further decision in which it granted Defendant's motion to dismiss the first cause of action , but sua sponte suggested the possibility of reopening the trial as to the second cause of action, and thereby reversing its earlier decision in that regard (Opinion #39484

[A1487]). The pertinent part of this decision was:

> "...Having carefully reviewed the testimony concerning the new "tread tuber" and the undisputedly salutary effect it would have upon operations at defendant's Conshohocken plant, and having found that the minutes of the negotiations between defendant's and plaintiff's representatives - introduced at the very conclusion of the plaintiff's case- disclose no effort made by defendant to use the new tread tuber as a bargaining tool for resolving the impasse on the key job evaluation issue, I have tentatively concluded that the interests of justice would be served by re-opening the case to permit either side to introduce testimony on the question of why defendant failed to make such effort. It is my present impression that if defendant is unable to offer a persuasive explanation, plaintiff's theory that defendant sought not to undo but to perpetuate the impasse would be measurably less hypothetical than it appeared when I rejected it from the bench ..." (id. at 1491; emphasis supplied.)

After submission of briefs as directed by the above opinion, the Court then said:

> "The memoranda submitted pursuant to the May 30 conference in chambers have left me unpersuaded that plaintiffs have borne their burden of proof on the present state of the record. However, plaintiffs having represented that they have located the potential witness J.J. Conway and that he is prepared to respond to subpoena, I will reopen the case to permit plaintiffs to offer Mr. Conway's testimony if they be so advised..." (Memo Decision and Order [A1492]; emphasis supplied.)

The District Court therefore made two distinct and abrupt changes of direction. In each case it did so without any new testimony or an offer of new evidence. Furthermore, the Court never explained what caused the switch from the first opinion indicating a shift of the burden of proof from Plaintiffs to Defendant to the latter opinion whereby the Court stated that the briefs had left it:

> "...unpersuaded that Plaintiffs have borne their burden of proof on the present state of the record..." (ibid.)

The subject of Clairmont's credibility was at all times a key factor in the case provoking the Court to make various characterizations of Clairmont. On February 26, 1973, in commenting on the argument of counsel, the Court remarked:

> "...Maybe I would spend that much time and trouble to get $5,000,000 but I don't think Mr. Clairmont would..." (Court A1122; emphasis supplied.)

During the final argument on September 21, 1973, after commenting again that it found Clairmont an essentially truthful witness the Court observed:

"...I want to preface what I want to say about Mr. Clairmont by saying unequivocally that I found him to be a truthful witness. Frankly, I was uneasy in relying on his testimony, for the simple reason that he had such a powerful personality I was unsure of my ability to see through it if he was not being truthful ..." (Court A1387-1388; emphasis supplied.)

"...I didn't say Mr. Clairmont was a God-given example. On the contrary, I said I found him to be truthful, but I didn't feel comfortable in relying too heavily on him, because I didn't trust my ability to see through his overpowering personality.

"I found Mr. Heinrich, on the other hand, to be truthful and I see you didn't challenge that in your argument And so --

"MR. AUERBACH: Only because Mr. Heinrich didn't testify to -- the only thing Mr. Heinrich testified to, your Honor, as I recall, was as to the order for the tread tuber. He was only on for a short time. He did not-- he was not questioned about the other aspects...it wasn't that I didn't challenge him. There was no testimony about those areas by him to challenge.

"THE COURT: I can't remember his testimony in detail. Maybe I am thinking of his nodding his head during the trial.

"My recollection of his testimony -- I will check it -- was that, the impression I got from it was that it was contrary to this theory of yours.

"MR. AUERBACH: I believe, your Honor, that the only testimony from Mr. Heinrich was in regard to the tread tuber. That was the general area in which he said what Mr. Hess had said was correct and gave us some financial information about it.

"THE COURT: You may be right.

"MR. AUERBACH: Therefore, I can't challenge testimony that he didn't give.

"THE COURT: Obviously. Maybe I am dis-remembering. This could easily be the impression I have from it...My recollection of that testimony was that it went counter to Mr. Auerbach's theory, but maybe I am assuming that is what he would have said." (A1428-1430; emphasis supplied.)

The Court's reference to Heinrich's testimony was admittedly incorrect but was merely a general impression based upon demeanor both in attendance at Court and on the witness stand. Specifically, Heinrich testified on two occasions under oath, the first being on February 23, 1973, when he was put on the stand for the limited purpose of qualifying a document (EX.125A[A1916]) submitted by Defendant and then, upon cross-examination by Plaintiffs, he testified exclusively on the subject of the tread tuber. This brief testimony covers only 10 pages of the transcript (HEINRICH A1006-1016). He again testified on February 26, 1973, and this time on the limited subject concerning his relationship to Clairmont, his means of communicating with him, and further testimony with reference to the tread tuber. Once again the testimony was brief, covering only 16 pages of the transcript (HEINRICH A1017-1033).

On the key issues of whether or not in July 1962 Clairmont anticipated a strike in 1963 and whether or not he expected a strike to be the result of his issuance of the Work Rules on July 16, 1963, the Court clearly stated that it did not believe Clairmont's testimony. The pertinent remarks were:

> "MR. TAYLOR:...And he said that he anticipated a strike but why? He, in 1962, as soon as he took over this sick company which he --
>
> "THE COURT: He said the contrary, and I didn't believe him on that issue." (A1101)
>
> "THE COURT: If the issue before me was whether Mr. Clairmont, using him as the personification of management, in sending that list of work rules, thought that the next day there would be a strike, I would so find... (A1079)
>
> "THE COURT: I would think that the strike was inevitable, it was an obvious conclusion that there was going to be a strike in this situation... (A1098)
>
> "THE COURT: All right. Bear in mind that erroneously or not, I have found that it is my view that at the time those work rules were promulgated...Wrongly or not, it is my view that at the time those were promulgated, management decided it is high time for a strike..." (A1414)

Thus, the Court was unsure of its ability to evaluate the credibility of Clairmont as a witness and looked for corroboration which apparently was not available with respect to Clairmont's specific and lengthy testimony and also did not believe Clairmont on very crucial issues.

The Court in its final opinion in which it granted Defendant's motion to dismiss the entire complaint at the end of Plaintiffs' case said:

> "...The procedural history of this case after the start of trial has not been altogether happy. In fact, it might lead some observers to conclude that the process of Presidential appointment, Senatorial confirmation and ceremonial induction does not automatically and instantly produce an experienced trial judge..." (Opinion #39975[1496 at 1497])

The Court's decision rested on three essential Findings of Fact as amplified in the colloquy between Court and counsel during final argument on September 21, 1973. The Findings were:

> "1. I accept as credible the witness Clairmont's outright denial that he or his Company harbored the <u>necessary fraudulent intent</u>.
>
> 2. I find that the testimony of the witnesses Heinrich and Conway (aside from the latter's present recollection of his then opinion of Clairmont's motives) is more consistent with the absence than with the presence of a <u>plan to defraud</u>.

3. I find that the conceded extrinsic facts are similarly more consistent with the absence rather than the presence of such a plan." (id. at A1500; emphasis supplied.)

IV. ARGUMENT

POINT I.

THE LOWER COURT MISCONSTRUED THE THEORY OF LAW APPLICABLE TO THE SUBJECT LITIGATION

The Plaintiffs instituted this action for breach of contract on the theory that the Defendant company, by forcing a strike as of July 18, 1963 and never thereafter taking any steps to seek a resumption of operations, effectively closed the plant on July 16, 1963 and broke its contract to make the payments required by the then existing Welfare Agreement (A33). The Lower Court made an absolute determination that the work stoppage otherwise referred to as a strike was in fact a lockout perpetrated by the Company as of that date (Court A1094, A1414).

To find a breach of contract the Plaintiffs had the burden of proving a shut-down initiated by the Company and an intention to remain closed on the part of the Company and its failure to make the payments due. This intention could be proven either by showing a prior plan or by inferring such a plan from the proven fact of a failure by the Company to compromise or otherwise attempt to undo the lockout. In this

case the record is quite clear that the Company made absolutely no efforts whatever to terminate the work stoppage and resume operations (EX99A-102A[A1881-1892]; EX127A-138A[A1918-1971]; EX35A-43A[A1666-1688]). Conversely, the opposite was actually proven in that the Company took great pains to rid itself of contracts, supplies, molds, inventories, raw materials, non-union employees, key executives, and certain contractual burdens (EX134A, p.3[A1956 at 1958]; CONWAY A1197-1198, 1220-1223, 1226-1227; HESS A267-272]).

In any event, it is clear that the action was not based upon a theory of fraud as appears to have been applied by the Lower Court based upon the Mansfield opinion (A1442). The District Court quoted the following in its final opinion:

> "The essential theory of the Union's case is that the Company (i.e. Clairmont) perpetrated a fraud upon its Local by unilaterally imposing conditions which provoked and forced a strike, thus making it appear that the Company was shut down by unreasonable Union members striking over simply economic issues." (A1442 at 1452; emphasis supplied.)

The fact that the Court continuously throughout the trial labored under the misconception of Plaintiffs' theory of action, involving, as noted above, Mansfield's essential fraud theory", placed a far heavier burden of proof on Plaintiffs than was proper.

The settled law is that the proof required to sustain a fraud cause of action is far more demanding than that needed to prove a breach of contract. Jo Ann Homes at Bellmore, Inc. v. Dworetz, 25 NY2d 112(1969); See 22 NY Jur., Evidence §640 et seq.

It is important to note that Judge Mansfield's essential theory of fraud" was irrelevant with respect to his decision since he denied Defendant's motion for summary judgment. It was dictum and not appealable. However, since the Trial Court applied the wrong rule of law to the evidence, it was prejudicial error.

POINT II

THE LOWER COURT WAS OVERLY INFLUENCED BY THE MANSFIELD OPINION AND FAILED TO TRY THE SUBJECT ACTION DE NOVO

The Court below was unduly impressed by the earlier opinion of Judge Mansfield in granting Defendant's motion for partial summary judgment (A1442). From the very outset of the trial when the Court first made reference to this opinion (Court A80, A80-1, A84, A85-1) and continuing thereafter to the final decision (A1073 et seq.), the Court continually bowed to Judge Mansfield's highly skeptical attitude towards

Plaintiffs' case (A1496 passim). Undoubtedly, Judge Mansfield himself, if he were the Trial Judge, would have put aside his own summary judgment opinion, which was based on affidavits, and tried the case solely on the available evidence with a fresh mind.

On February 26, 1973 at the commencement of the argument on Defendant's first motion to dismiss, the Court opened the discussion with the following:

> "Let's start with Judge Mansfield's opinion on page 1187 where he said, 'If the record before us at trial were the same as that before us on this motion, judgment would be entered in favor of the Company.' What have you proved that wasn't before Judge Mansfield?" (Court A1073)

In the Court's final opinion dismissing the complaint it again referred to the Mansfield opinion but this time with reference to the burden imposed on Plaintiffs:

> "Thus the Union must prove that the discontinuance of plant operations by the Company actually occurred at or about the time when the strike commenced, which was on July 16, 1963, rather than on November 30, 1964, when the Company's Board voted to discontinue operations. Upon the record before us the Union appears to have almost no chance at all of sustaining this heavy burden." (A1442 at 1452; emphasis supplied.)

The psychological burden which the Plaintiffs had to overcome is clear. But since it appears likely that the Lower

Court adopted the incorrect theory of the action from the Mansfield decision, as discussed above, it is quite likely that the Lower Court may well have been persuaded by the non-essential dicta of the Mansfield opinion having to do with a subjective view of Plaintiffs' burden and their chances of sustaining same:

> "...Upon the record before us the Union appears to have almost no chance at all of sustaining this heavy burden...Notwithstanding the apparent flimsiness of plaintiff's claim...Despite the weakness of the claim, it does present an issue as to the intent of the Company..." (A1442 at 1452-1454; emphasis supplied.)

As if further confirmation of the persuasive effect of the earlier decision were needed, we need only look to the Lower Court's comment on final argument on September 21, 1963:

> "...You start off then with the high impossibility of the plaintiff's theory -- I think it is your theory..." (Court A1390; emphasis supplied.)

The Lower Court was advised that the record on trial was substantially greater both in scope and detail than the record originally presented before Judge Mansfield on the motion for summary judgment. Specifically, the Court was advised that Plaintiffs had presented at the trial a complete set of minutes of all negotiation sessions between the parties (EX99A-102A[A1881-1892]; EX127A-138A[A1918-1971]), testimony and other evidence concerning the important tread tuber

equipment (R58; EX125A[A1916], the minutes of the April 16, 1963 meeting between Clairmont and the Union (EX90A[A1802]), as well as the vital testimony of Clairmont (A610-976), Garber - the International trouble-shooter (A332-588), Conway - the Chief Company Negotiator (A1127-1384), and to a limited but important extent, Heinrich (A1006-1033).

None of the foregoing was available to the parties at the time the motion for summary judgment was considered. The reason for this was the simple fact that previous counsel for Plaintiffs had somehow placed the case on the Calendar without pre-trial Discovery and Inspection proceedings. For example, with respect to the record befort it, Judge Mansfield said:

> "Upon the record before us the Union appears to have almost no chance at all of sustaining this heavy burden. Quite aside from testimony of Company officials as to their intentions, there is overwhelming evidence that the Company, after the strike began and even after the Welfare Agreement was terminated, was struggling to resume operations. For instance, it continued after September 8, 1964 to maintain at the Coshohocken plant a large staff (some 55 persons) of executive, administrative, sales and technical personnel. Salesmen continued to promote and sell Lee tires, to conduct sales training programs, and to service Lee tire sales branches. There was no attempt to dispose of the plant or any of its tire-making equipment. On the contrary, maintenance personnel continued to keep the plant and machinery in condition for resumption of tire manufacture as soon as the strike should end. Laboratory personnel continued to redesign molds for development of new tire styles for future production.

"During the entire period existing customers were supplied by arrangements with Mohawk Rubber Company and United States Rubber Company to manufacture Lee tires from Lee Molds." (A1442 at 1452-1453; emphasis supplied.)

With the exception of the undisputed fact that the Company contracted out certain minimal tire production to satisfy existing contracts during the course of the lockout, the Trial Court specifically found no evidence in the record concerning the alleged staff maintained and the operations being pursued by the Company at its Conshohocken plant after the termination of the Welfare Agreement on September 8, 1964:

"THE COURT: Yes, I appreciate there is no evidence before me to support Judge Mansfield's statement that they were working on -- -- laboratory work... You have to have maintenance." (A1114-3)

"THE COURT: No, I do not think you need to belabor that point because I recognize that there is nothing, at least unless I have overlooked something, there is nothing in the record before me to show there were employees doing anything more than maintenance, and that does not have any maintenance.

"MR. AUERBACH: That was the point I wanted to make.

"THE COURT: Judge Mansfield talked about laboratory work and there is no such evidence before me.

"MR. AUERBACH: No, you have got a plant this size, this is what you have got to have, maintenance and guards and one or two supervisors and whatnot. This is not indicative that they were trying to keep the plant going, the business going.

"THE COURT: I apppreciate that." (A1115)

Furthermore, while there was no direct evidence of efforts by Clairmont to dispose of the plant or any of its equipment, at least for the purpose of straightforward liquidation, there certainly was testimony to the effect that he was anxious to dispose of the Conshohocken operation in some manner. In an effort to sell the plant he went to every major manufacturer in the country, but couldn't negotiate a deal with the larger firms because of antitrust problems, whereas the smaller companies, which were the Defendant's main competitors, were not interested in any talk about a merger or purchase due to the existing labor situation, then in the process of a lockout (CLAIRMONT A677-678)

His efforts to sell included several attempts to interest certain types or organizations, who themselves were large distributors or retailers of tires, in a merger with the Defendant Company, all of which efforts preceded the lockout commencing July 18, 1963 (EX90A[A1802]). His anxiety to unload the present operation is clearly shown by the following statement:

> "I was ready to make anything just to be able to get rid of this baby..." (CLAIRMONT A677).

It is interesting, furthermore, to note that when the Court asked Clairmont the time period in which he was seeking a sale of the Conshohocken plant, he stated that it was toward the end of the strike and around the time when the Company formally announced termination of operations (CLAIRMONT A676). However, the record is quite clear that his efforts were almost exclusively before and during the strike-lockout:

> "So, on account of this labor situation nobody was interested to become involved with Lee. Then we stayed in this situation until the Welfare Agreement which expired a year later came to be renegotiated, ... (CLAIRMONT A677-678; emphasis supplied.)

Based upon the foregoing it seems obvious that while such extreme characterizations of Plaintiffs' case as used in the Mansfield opinion were at least irrelevant to that decision they may have seriously undermined the Trial Court's necessary judicial neutrality causing a potentially biased outlook and thereby creating an unconscionable burden on Plaintiffs (A1073 et seq.). Since the Trial Court never separated itself from the undue influence of the Mansfield dictum and prediction of result, the final decision and jusgment of the Lower Court must be reversed for failure to try the subject case de novo.

POINT III

THE LOWER COURT'S FINDINGS OF FACT ARE CLEARLY ERRONEOUS WITHIN THE MEANING OF FRCP 52(a)

On the subject of overturning a Lower Court decision where the facts were tried without a jury, FRCP Rule 52(a) states in part:

> "...findings of fact should not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses..."

This rule has been interpretated by the U. S. Supreme Court in a frequently quoted statement by Justice Reed in United States v. United States Gypsum Co., 333 U.S. 364, 394-395(1948):

> "...this court may reverse findings of fact by a trial court where 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

A Finding of Fact by a District Court is generally regarded as clearly erroneous if it is unsupported by substantial evidence, based upon misapprehensions as to the effect of the evidence, contrary to the clear weight of the evidence or induced by an erroneous view of the law. Esso Standard Oil Co. v. The S. S.

Caposia, 259 F2d 486 (2nd Cir. 1958); United States v. Schultetus, 277 F2d 322 (5th Cir. 1960); John Blue Co. v. Dempster Mill Mfg. Co., 295 F2d 668 (8th Cir. 1960); Williams v. Babcock & Wilcox Co., 262 F2d 253 (3rd Cir. 1959). However, such a choice between two permissible views of the weight of evidence is not clearly erroneous. United States v. Yellow Cab Co., 338 U.S. 338 (1949).

Another factor to be considered is the reliability of the trier of the facts. While Appellate Courts should be slow to impute to Trial Courts a disregard of their responsibilities or a lack of diligence or perspicacity in evaluating credibility of witnesses and the weight of evidence, the reputation and standing of the trial judge as to experience, discernment, detachment, reliability, carefulness, probity and other qualities that combine to make judging the master's art, should not be ignored (5A Moore's Federal Practice ¶ 52.03[1]).

The most elaborate treatment of the FRCP Rule 52(a) limitations on the scope of review was set down by Judge Frank in Orvis v. Higgins, 180 F2d 537 (2nd Cir. 1950), cert. denied, 340 U.S. 810, where the Court carefully distinguished between the ability of the Appellate Court to review and appraise the cogency of demeanor evidence as compared with documentary evidence and other types of undisputed testimony.

"...Where a trial judge sits without a jury, the rule varies with the character of the evidence:
(a) If he decides a fact issue on written evidence alone, we are as able as he to determine creditibility, and so we may disregard his findings.
(b) Where the evidence is partly oral and the balance is written or deals with undisputed facts, then we may ignore the trial judge's finding and substitute our own, (1) If the written evidence or some undisputed fact renders the credibility of the oral testimony extremely doubtful, or (2) If the trial judge's finding must rest exclusively on the written evidence or the undisputed facts, so that his evaluation of credibility has no significance. (c) But where the evidence supporting his finding as to any fact issue is entirely oral testimony, we may disturb that finding only in the most unusual circumstances." See also Luckinbach S.S. Co. v. U.S., 157 F2d 250 (2nd Cir. 1946); Kind v. Clark, 161 F2d 36 (2nd Cir. 1947); The Coastwise, 68 F2d 720 (2nd Cir. 1934); Norment v. Stillwell, 135 F2d 132 (2nd Cir. 1943); Stokes v. U.S., 144 F2d 82 (2nd Cir. 1944); Broadcast Music Company v. Havana Restaurant Corp., 175 F2d 77 (2nd Cir. 1949); Daitz Flying Corp. v. United States, 167 F2d 369 (2nd Cir. 1948).

As will be clearly seen by the factors recited below, the Lower Court's Findings of Fact (supra at p.35) must be held "clearly erroneous" within the meaning of Rule 52(a) as interpreted by the leading authorities on the subject cited herein.

A. The trial judge's admitted inexperience deprived him of control of the case.

The Lower Court admitted its own inexperience leading to a somewhat haphazard procedural history of the trial (supra at p.35). It is submitted, however, that the inexperience led

to substantive errors as well. For instance, the Court was unduly influenced by the dicta and prediction of the earlier Mansfield opinion as stated above and was overawed by a key witness, Clairmont, as is set forth below. Furthermore, the Court constantly shifted its position on certain issues leading to inconsistent findings as set forth below. In addition to these factors the Lower Court may well have drawn improper inferences from the evidence and testimony before it due at least in part to these factors.

It is specifically in this area, however, that the Appellate Court has the right and responsibility to draw its own inferences from settled facts uninhibited by the "clearly erroneous" rule including all situations where the reviewing court, within the meaning of the Orvis case (supra), would be in as good a position as the Trial Court to determine particular issues. Mottaghi v. Barkey Importing Co., 244 F2d 238 (2nd Cir. 1957) cert. denied 354 U.S. 939; National Latex Products Co. v. Sun Rubber Co., 274 F2d 224 (6th Cir. 1959); Hart v. Gallis, 275 F2d 297 (7th Cir. 1960); Cordovan Associates v. Dayton Rubber Co., 279 F2d 289 (6th Cir. 1960); Smyth v. Barneson, 181 F2d 143 (9th Cir. 1950); Kuhn v. Princess Lida of Thurn & Taxis, 119 F2d 704 (3rd Cir. 1941).

B. The Trial Court was unduly overawed by the key witness, Clairmont.

The District Court showed an undue amount of respect for Clairmont's testimony and in fact seemed overawed by him as reflected in certain of the Court's statements:

> "THE COURT: Just in general, Mr. Clairmont didn't impress me as a person who would go into a situation that way. If he went into it and couldn't get out, that would be another thing, but he wouldn't go into this situation for the purpose of creating an elaborate charade such as this one. I just can't conceive that he would. I don't think a man of his general character and appearance would have undertaken the time and trouble to create this kind of charade..." (A1121)

> "THE COURT: Maybe I would spend that much time and trouble to get $5,000,000 but I don't think Mr. Clairmont would." (A1122; emphasis supplied.)

> "THE COURT: It does not mean he is planning to liquidate it. One of the difficulties of this case, as far as you are concerned, is this man did not look to me like a fellow who would go and buy a company for the purpose of having this kind of a fight on his hands. And according to your theory that is what he did." (A1107)

The fact of the Court's apparent high regard for Clairmont was both improper and prejudicial to Plaintiffs since the Court accepted categorically Clairmont's outright denial of fraudulent intent (Court A1117) and made this the cornerstone of its Findings of Fact (supra at p. 35).

C. The Trial Court was unable to properly assess Clairmont's testimony.

Having been overawed by Clairmont, the Court stated its need for corroboration of his testimony and made the following pertinent remarks:

> "THE COURT: ...Frankly, I was uneasy in relying on his testimony, for the simple reason that he had such a powerful personality. I was unsure of my ability to see through it if he was not being truthful." (A1387-1388)

> "THE COURT: I didn't say Mr. Clairmont was a God-given example. On the contrary, I said I found him to be truthful, but I didn't feel comfortable in relying too heavily on him, because I didn't trust my ability to see through his overpowering personality." (A1428; emphasis supplied.)

Based upon the foregoing comments this Court must very carefully review all of the demeanor testimony given by Clairmont and appraise it with extreme caution taking into full account Clairmont's contradictions in oral testimony and his inconsistencies and contradictions as expressed in contemporaneous statements set forth in documentary evidence.

D. In seeking corroboration of Clairmont's testimony the Trial Court relied on evidence not in the record.

As shown above, the Trial Court, having been unduly impressed by Clairmont as a witness and feeling the need for

corroboration of same, looked to the testimony of Willard Heinrich, a top corporate officer and former associate of Clairmont, who was brought in by him to be in charge of the Conshohocken operation (HEINRICH A1007, A1030; EX54A[A1694]). The following colloquy between Court and counsel completely disposed of any such possibility.

"...I found Mr. Heinrich, on the other hand, to be truthful, and I see you didn't challenge that in your argument. And so --"

"MR. AUERBACH: Only because Mr. Heinrich didn't testify to -- the only thing Mr. Heinrich testified to, your Honor, as I recall, was as to the order for the tread tuber. He was only on for a short time. He did not -- he was not questioned about the other aspects. It wasn't that I didn't challenge him. There was no testimony about those areas by him to challenge."

"THE COURT: I can't remember his testimony in detail. Maybe I am thinking of his nodding his head during the trial. My recollection of his testimony -- I will check it -- was that, the impression I got from it was that it was contrary to this theory of yours."

"MR. AUERBACH: I believe, your Honor, that the only testimony, basically the only testimony from Mr. Heinrich was in regard to the tread tuber. That was the general area in which he said what Mr. Hess had said was correct and gave us some financial information about it."

"THE COURT: You may be right."

"MR. AUERBACH: Therefore, I can't challenge testimony that he didn't give."

"THE COURT: Obviously. Maybe I am disremembering. This could easily be the impression I have from it." (A1428-1429; emphasis supplied.)"

Therefore, the Court lacked the requisite corroboration of Clairmont's detailed testimony with respect to Heinrich and it accepted Conway's testimony as corroboration in the negative sense meaning more consistent with the absence rather than the presence of a plan to defraud (Court A1437-1438).

E. The Court itself did not even believe Clairmont on certain critical issues.

With respect to the two significant issues of whether or not Clairmont anticipated a strike in 1963 and whether or not the Work Rules were intended to force the Union to strike Clairmont said:

"THE WITNESS: We knew we were going to enter negotiations. I wouldn't have expected 99 to 11 that we are not going to be able to write the new working agreement after all we showed them and everything. I wouldn't have expected a strike with all the arguments and all the facts and figures we have been able to show the union. I didn't expect we would have a strike..." (CLAIRMONT A885)

"Q. Are you telling us that with everything that you had in the work rules of July 18th, and this letter, that you seriously expected people to continue working?

"A. Yes, because they always could have walked out if we would have put in anything unreasonable..." (CLAIRMONT A816)

The Court's comments on this testimony were:

"MR. TAYLOR:...And he said that he anticipated a strike but why? He, in 1962, as soon as he took over this sick company which he --

"THE COURT: He said the contrary, and I didn't believe him on that issue." (A1101)

"THE COURT: If the issue before me was whether Mr. Clairmont, using him as the personification of management, in sending that list of work rules, thought that the next day there would be a strike, I would so find." (A1079)

F. Clairmont, as a witness, was incredible per se.

The sum total of Clairmont's testimony, properly analyzed, shows he was so evasive and contradictory on vital issues as to be incredible per se and completely unworthy of belief. Since the Trial Court credited his testimony and based its ultimate decision in the case heavily upon Clairmont's general denial of the allegations of Plaintiffs, it is well to consider at least certain of the most crucial parts of his testimony.

1. Clairmont on labor relations.

Clairmont claimed that the labor relations of the prior administration were too placid to be effective (CLAIRMONT A621-622, 626) and that management had been so soft on labor that they had

never suffered a strike. He felt this symbolized the fact the Company was always giving in to the Union (CLAIRMONT A625, 634-635).

However, concerning his own career, Clairmont testified that when he became Chairman he told the Union leaders:

> "...I told the gentlemen not only did I not have a strike at any time in all of this about over twenty years of experience in manufacturing, but we did not come to an arbitration; we always have been able to get together on any issues without even having recourse to any arbitration." (CLAIRMONT A635-636; emphasis supplied.)*

Which Clairmont should be believe?

2. Clairmont on plant efficiency.

Clairmont testified he had great expertise in manufacturing based upon a long career operating such companies (CLAIRMONT A624) and that he examined the plant very carefully on several visits prior to taking control (CLAIRMONT A622-624). He ordered a thorough audit of and accounting for all equipment and inventory, writing off all obsolute items to present a truer picture of the Company's financial position (CLAIRMONT A871). However, when

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*The record discloses that although there had never been any strikes at the Conshohocken plant, there were arbitrations over various disputes (CONWAY A1313, 1368).

asked whether the Company required any further equipment to make it more competitive in the marketplace he said:

> "A. We knew we had everything we needed... I had been told by everybody that we have all throughout all the departments the equipment we need to produce competively, and that was to my satisfaction." (CLAIRMONT A838; emphasis supplied.)*

But, when questioned about the tread tuber equipment, Clairmont had nothing but a vague memory at best (CLAIRMONT A839-840). Heinrich testified he discussed the matter several times with Clairmont in seeking approval for expenditure of some $200,000 for support equipment necessary for installation of the tread tuber (HEINRICH A1008-1016). Furthermore, he specifically agreed with the testimony of Hess, President of Local 227, that the tread tuber would provide a major increase in production efficiency (HEINRICH A1007, 1016). The Court agreed, referring to the "undisputedly salutary effect it would have on operations." (Opinion #39484, p.5[A1487 at 1491])

In the face of Clairmont's insistence that the main problem of the Company was the high cost of production due to laziness of the workers, his lack of memory with regard to such

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* *cf. also his testimony that the plant was well laid out for good production cost (CLAIRMONT A772-773).

an important piece of equipment which, when set up, was the size of a football field (HESS A995), seems astounding. There can be no doubt that he knew about it back in 1962 so he was not being truthful when he said he had everything needed for efficient production.

3. Clairmont on the effect of the Work Rules.

As noted above, Clairmont stated that he did not expect that the Union would strike as a result of his promulgation of the Work Rules (CLAIRMONT A816). Furthermore, the Court specifically disbelieved him on this point. And, in fact, found that the clear intention of the Company, meaning Clairmont, in issuing them was to force a strike (Court A1079). The Court determined that this was intended as a lockout (Court A1094).

It is respectfully submitted that Clairmont's testimony that he never expected the Work Rules to result in a strike was rank perjury and should have caused the Trial Court to treat all of his testimony with great skepticism.

4. Clairmont on correcting the alleged abuses of prior management concerning labor relations.

Clairmont decried the Company's prior conduct of labor relations. Yet when he acquired control of the company, Conway

was turning 65 and about to retire (CONWAY A1136-1137). However, he was persuaded to remain with the Company to aid new management in the upcoming contract negotiations (CONWAY A1138). The Court agreed that retaining Conway was an affirmative act by Clairmont (Court A1426). Rather than hire his own man to get tough with the Union as he supposedly deemed necessary, he kept the representative of the old, "non-existent", management. It is further surprising since he stated:

> "...The first thing I did when I became Chairman, I recognized I had to build up a management team, a man for sales, a man for manufacturing, treasurer, and so forth. I made the necessary changes..." (CLAIRMONT A627; emphasis supplied.)

Obviously, Clairmont's intentions in this area are at least inconsistent and highly suspect. If he considered Conway acceptable then his testimony concerning the terrible prior labor relations was untrue. Furthermore, Conway stated quite clearly he was never asked for his opinions concerning any of the events in question during the entire time he remained with the Company (CONWAY A1163-1165, 1195-1196, 1212-1214, 1218). The Court even considered that retaining Conway might be part of a nefarious scheme by Clairmont (Court A1438).

5. Clairmont on being surprised at the condition of the Company and being trapped by the situation.

Clairmont acquired control over the course of an entire year (CLAIRMONT A613-615), the investment was accompanied by a substantial investigation into the affairs of the Company (CLAIRMONT A622-624), and he compiled an exhaustive inventory of all plant and equipment, merchandise and obsolete materials (CLAIRMONT A871). He professed experience with tough unions (CLAIRMONT A635) and a long background in manufacturing operations (CLAIRMONT A624).

Considering the foregoing qualifications plus the fact that he had personally organized a new management team (EX54A [A1694]);(CLAIRMONT A627), it is somewhat astonishing that he told the Court: (a) that he was surprised in 1963 when he found that the Company was in an impossible situation (CLAIRMONT A628), (b) that he had not counted on the Union's resistance to changes (CLAIRMONT A627) and (c) that he only discovered the Company's lack of competitive costs by chance encounters with people recently hired from competitors (CLAIRMONT A627-630). When asked about the cost and extent of his stock purchases and whether or not he had sold at a profit, he was suitably vague (CLAIRMONT A845).

To complete this picture the record shows that on June 12, 1963 the Company issued under Clairmont's authority (CLAIRMONT A938) a statement to stockholders which was so pessimistic in outlook that it suggested there was very little hope for the survival of the Company (EX86A[A1792]. It was issued just after April 16, 1963 meeting with the Union (EX90A[A1802]) and after contract negotiations began on May 29, 1963 (EX99A et seq. [A1881 et seq.]) and just before the lockout which took effect on July 18, 1963 (Court A1414, A1094).

However, his entire credibility is destroyed by the fact that he and his partners were actively purchasing Company stock immediately after the June 12th announcement, to the extent that the record shows that they purchased 3700 shares on June 13, 1963 alone and a total of some 18,000 shares within that week (EX60A]1]-[9] [A1731-1742]). They made substantial further purchases in October 1963 totaling some 16,000 shares just prior to the announcement of the sale by the Company of its Republic Rubber Division (CLAIRMONT A954; EX61A[A1745]; EX62A[A1746]).

G. Clairmont's contemporaneous statements as contained in uncontradicted documentary evidence completely negates his oral testimony.

At all times the record shows Clairmont claimed the Company's primary problem above all was lack of sufficient sales (EX30A passim [A1660]; EX90A[A1802 at 1803-1804, 1806]) to keep production going

at full capacity (EX86A[A1792]; EX108A[A1903] through which production costs would be kept down (CLAIRMONT A895; EX90A[A1802] passim). He never complained the workers were lazy (CONWAY A1160), production costs too high, particularly as a result of the labor agreements (EX30A passim [A1660]; EX32A passim [A1664]; EX90A, p.2,5 [A1802 at 1803, 1806]). At the trial his entire testimony revolved around the central theme that the Company's economic plight was primarily caused by the labor agreements (CLAIRMONT A610-A976 passim).

His contemporaneous statements completely contradict his testimony. At meetings with the Union in the Fall of 1962 he stated the Company's problems were lack of sales and distribution and the Unicn agreements were not responsible (EX30A [A1660]; EX32A[A1664]). He repeated this in greater detail in the 1962 annual report (EX54A, p.3-5[A1694 at 1695-1697]). On March 25, 1963 in an interim report to shareholders, he issued a statement explaining that the Company was caught between a low level of sales and a high production capacity, necessary to fully utilize to keep manufacturing cost down (EX108A[A1903]).

On April 16, 1963 in a meeting with the Union, he reiterated that the main problem was lack of sales and outlets. The plant was geared to produce a substantial amount of tires

but had no customers or outlets for them, having lost its principal customer (Philips Petroleum) and its own branches were falling apart. The Company had almost no other source of income (EX90A, p.3[A1802 at 1804]). He best summarized the situation at this time:

> "The sum and substance of all this is that we are left without outlets. We have to start practically from scratch. We have to develop more outlets to sell the tires we are equipped to produce. It can be done within a reasonable time if you have the money. What I cannot do and nobody can do is build up a market for thirty million dollars of sales under the present market conditions. This is a long haul proposition. First you need a selling organization. We have to rebuild the image of the company - convince people we are here to stay. There are alot of things to be done and alot of money to be put in, and after you have done all this you have to sell your way in. This is the job that will have to be done. I don't say it cannot be done - everything can be done at a price. The price is almost staggering..." (ibid.)

> "Yes, our problem is not production. I did not say that the union is responsible...We know what to do in the plant. We have no sales organization -- we haven't been able to pick up anyone to work in sales." (id. at 1806)

Clairmont continued to repeat these facts from the opening day of contract negotiations (EX99A, p.1[A1881]) he issued a gloomy report repeating the same facts but with a dim outlook for the negotiations (EX86A[A1792]). It was immediately after

this report that he and his group bought a tremendous amount of stock from unsuspecting stockholders as noted above. The facts of the Company's predicament were even re terated during the lockout (EX55A[A1702]; EX62A[A1746]).

H. The case at bar clearly falls within the pattern of the leading cases in this Circuit which are contrary to the decision of the Trial Court.

The case at bar falls clearly within the fact pattern of Orvis v. Higgins, supra,and other leading cases in this Circuit which similarly involve the issue of intention. In Gypsum, supra, the Supreme Court reversed the finding of the trial court which was based upon general denials of the defendants if an alleged agreement to do the things which were in fact done, holding that such testimony was in conflict with contemporaneous documents and the court could therefore give such testimony little weight.

In Orvis, a husband and wife claimed to have created reciprocal trusts in a purely coincidental and independent manner and not with the intention to act reciprocally. There the court held that the mere denial of such intentions could not be a proper basis for the trial court's decision in their favor without substantiating positive evidence. Their actions and contemporaneous statements, taken together, formed a chain

of circumstances upon which the court drew an irresistible inference contrary to their testimony and the lower court's findings (180 F2d at 541).

A reviewing court is not required to accept a trial court's findings based only on secondary or derivative inferences from the facts which a trial court inferred from testimony of witnesses. Such findings of facts thus derivatively inferred may be ignored on review if other rational derivative inferences are available or if such findings are based on a very slim foundation in testimony. American Tobacco Co. v. The Katingo Hadjipatera, 194 F2d 449 (2nd Cir. 1951), cert. denied 343 U.S. 978; see also E.F. Drew & Co. v. Reinhard, 170 F2d 679 (2nd Cir. 1948).

POINT IV.

THE TRIAL COURT'S CONCLUSIONS WERE BASED ON INCONSISTENT FINDINGS

The Trial Court followed Judge Mansfield's "essential theory" and was guided in its deliberations over the evidence produced by Plaintiffs' "heavy burden". But it did not follow this "theory" consistently. The Court came to a determination that the work stoppage was a lockout and that there was no evidence in the record indicating alleged attempts to resume

operations (Court A1094, A114-3). The Court erred in not pursuing the theory by seeking to find the intention of the Company to either remain closed ab initio or to inquire into the Company's failure to make any concerted effort to break the impasse in negotiations for the purpose of attempting to terminate the lockout and thereby resume manufacturing operations.

The court did conjecture as to the possibility of Clairmont's attempting to actually win the lockout (Court A1089). The record is woefully lacking in any supporting evidence on this point, and, in fact, is clearly contrary. The record of the negotiating sessions shows no material concessions by the Company from start to finish and Heinrich even stated that the Company would not budge on any aspects of its proposals (EX37A, p.3[A1668 at 1670]). Furthermore, the Company seemed primarily interested in rescinding the 1961 cost items (EX127A, pp.6-7 [A1935 at 1936-1938]). This alone puts Clairmont's testimony that the job evaluation program and the 25% wage cut were most important to the Company in a highly suspicious light.

Compared with the several Union offers to compromise various issues, the Company continued to demand all or nothing long after the lockout commenced (EX41A[A1681]) and Heinrich even refused to meet with the Union unless they announced a

change of position, which had to be the Union's acceptance of all of the Company's major proposals (EX28A, p. 3 [A1672 at 1674]). The Union kept on trying to break the impasse by seeking compromises on various issues, whereas the Company never changed its position even throughout 1964 (EX42A, p. 2[A1683 at 1684]; EX43A[A1688]; see generally EX99A-102A[A1881-1892]; EX127A-138A[A1918-1971]; EX35A-43A[A1666-1688]).

Likewise, the court below was inconsistent with regard to the effect of the tread tuber on the contract negotiations. Whereas the court indicated it would sua sponte reopen the trial on the basis of:

> "...It is my present impression that if defendant is unable to offer a persuasive explanation, plaintiff's theory that defendant sought not to undo but to perpetuate the impasse would be measurably less hypothetical than it appeared when I rejected it from the bench..." (Court Opinion #39484, p.5[A1487 at 1491])

it subsequently granted the reopening for different reasons without explanation for its reversal:

> "...The memoranda...have left me unpersuaded that plaintiffs have borne their burden of proof on the present state of the record..." (Court Memo and Order [A1492]

POINT V.

THE LOCKOUT, WITHOUT EFFORTS TO TERMINATE IT, CONSTITUTES A BREACH OF CONTRACT BY DEFENDANT

The court below went on the assumption that the lockout was a bargaining tool used by Clairmont even though he never made

such a claim (Court A1089). In fact, he insisted that the work stoppage was a strike and the court specifically found that was not the fact (Court A1094). Furthermore, Clairmont never did use the lockout as a bargaining tool. If it were, he would have tried to offer compromises in order to get various concessions from the Union, but the record, as noted above, clearly shows no such effort at any time (EX99A-102A passim [A1881-1892]; EX127A-138A passim [A1918-1971]; EX35A-43A passim [A1666-1688]). Also, Conway testified that he was never asked for any suggestions on how to break the impasse (CONWAY A1218).

Plaintiffs alleged a breach of contract and the Trial Court merely had to determine that the close-down was a lockout instituted by the Company with no efforts to terminate that lockout in order to sustain Plaintiff's allegations. The court below never found any specific, serious attempts to reopen.

POINT VI.

THE TRIAL COURT'S FINDINGS OF FACT ARE CLEARLY CONTRARY TO THE WEIGHT OF THE EVIDENCE

Taking into account the weight of the credible evidence before the Trial Court it is submitted that it was error for it to find in Defendant's favor. All of the credible evidence pointed to a lockout on July 16, 1963 without any intention of reopening

and therefore constituted a permanent closing within the meaning of the Welfare Agreement, Article II, Section 6 (EX36, pp.13-15 [A1581 at 1593-1595]; EX37[A1607]).

Taking an over-view it now becomes apparent that Clairmont knew he was taking over a non-viable operation. When he was unable to get rid of the welfare liabilities before closing down he forced the stoppage. Any employer can force a stoppage. He had nothing to lose. If he could convince people he was forced to close he could save a lot of money that was due the employees; if he couldn't convince them he would be liable for the close-down provisions of the Welfare Agreement anyway; it was worth the try. He overawed the court below into believing his worthless testimony; it is submitted that this Court will not stand in awe of this untruthful witness.

The weight of the credible evidence clearly favors the Plaintiff. United States v. United States Gypsum Co., supra.

> "I am glad to report to you that during the past fiscal year we were able to solve the Company's basic problem by finally disposing of a situation which generated heavy losses and carrying charges and in which there was no future for the company..." (Clairmont Annual Report to Shareholders, October 31, 1965-EX57A[A1723])

V. CONCLUSION

The Order and Judgment dismissing Plaintiff's second cause of action should be reversed and the case assigned to a different district judge for a new trial.

Respectfully submitted,

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Service of 2 copies of this within
Bill is admitted this
22 day of December 197-

ATTORNEY FOR Defendant Appellee